IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.676 OF 2007
IN
NOTICE OF MOTION NO.1590 OF 2006
IN
L.C. SUIT NO.1686 OF 2006

The Bombay Xaverian Corporation
Pvt. Ltd. **..Appellants**
(Orig.Plaintiffs)

Versus

1. Ramanlal Chhotalal Shah
since deceased by his legal heirs
1A.Atul Ramanlal Shah

2. Siddarth Ramanlal Shah

3. Champaben Ramanlal Shah

4. Municipal Corporation of
Greater **.. Respondents**
(Orig.Defenants)

Shri Y.S.Jahagirdar i/b. Shri D.A. Joseph h/f. M/s. Dand Associates for the Appellant
Shri Ravi Kadam, Advocate General with Shri T.N. Subramanian, Senior Advocate with Shri Birendra Saraf, i/b. M/s.Kishore Thakordas & Co., for the Respondent Nos.1 to 3
Shri R.A. Malandkar, for the Respondent No.4-BMC

CORAM : S.R.SATHE,J.
DATED : 18/10/2007

P.C.:-

1. Heard learned Counsel on both the sides, at length.

2. Appeal heard finally at admission stage.

3. A short point which falls for consideration in this appeal is whether Plaintiffs/lessors are entitled to restrain defendants/lessees from loading the TDR purchased by them on the lease land in view of the terms and conditions of the agreement in question.

4. The brief facts giving rise to the above issue are as under :-

The suit land bearing plot No.32 out of CTS No. 238 of village Gundavali at Mahal Industrial Estate, Andheri (East), Mumbai is owned by Plaintiffs. They executed a registered lease deed of the said land in favour of defendant Nos.1 to 3 on 01/11/1973 for a period of 98 years. As per the terms and conditions of the said lease deed the defendants were allowed to carry out construction on the suit plot as per the regulation and bye-laws of the Municipal Corporation of the Greater Bombay. Defendants were also permitted to mortgage their right, title and interest in the demised premises and the building structure standing thereon in favour of any person either on leave and license or on

ownership basis. It was also provided in the lease deed that if lessees desire they can get the lease renewed for further period of 98 years.

5. It is Plaintiff's case that defendants by their letter dated 03/08/2005 requested them to issue NOC for demolition of existing building and for re-development on the suit land. However, at that time, defendants did not disclose that they have purchased TDR of area admeasuring 3830 sq.meters and that they intend to load the said TDR on the suit land. Defendants also did not disclose about the building plans having sanctioned by the BMC. Plaintiffs did not issue NOC. Even then defendants succeeded in obtaining commencement certificate dated 21/10/2005. Subsequently, Plaintiffs came to know that the conditions in IOD have been amended by the defendant No.4 BMC. Plaintiffs found that the defendant Nos.1 to 3 demolished existing factory shade on the suit land and started new construction. According to Plaintiffs, they being owners were only entitled to use TDR and not the lessees. Plaintiffs, therefore, filed the present suit for declaration that defendant Nos.1 to 3 are not

entitled to use TDR on the suit land without their consent. They also prayed for declaration that defendants are not entitled to carry out any construction on the suit land contrary to the terms and conditions of the lease deed and prayed for mandatory injunction directing defendant No.4 BMC to cancel and revoke the building plans sanctioned on 16/05/2005 and amended on 03/12/2005 and also cancel commencement certificate issued in favour of defendants. Plaintiffs also prayed for permanent injunction restraining defendants from carrying out construction of any nature on the suit land in pursuance of the building plans mentioned above.

6. Plaintiffs also filed Notice of Motion and prayed that pending the hearing and final disposal of the suit, defendant Nos.1 to 3 be restrained from carrying out construction of any nature on the suit land in pursuance of the sanctioned plans dated 16/05/2005 and 03/12/2005.

7. Defendant Nos.1 to 3 resisted the Notice of Motion on various grounds. They contended that no

restriction is imposed in lease deed that the defendants can not utilize TDR for development or re-development of the property though permitted in accordance with the rules and regulations and bye-laws of Municipal Corporation. Secondly, they contended that defendant No.4 Municipal Corporation has sanctioned necessary plans and has also waived some of the conditions in IOD. As a result of the same, it is not necessary for the defendant to seek consent of the Plaintiffs for utilizing TDR. Defendants, therefore, contended that Plaintiffs have no right to obstruct defendants development and Plaintiffs have not made out any prima facie case and the balance of convenience is also not in favour of Plaintiffs. Hence, on these grounds they prayed for the dismissal of the Notice of Motion.

8. Defendant No.4 BMC filed their say and opposed the Motion. They contended that suit is bad for want of Notice under section-527 of the BMC Act. They also contended that BMC has issued necessary IOD and building plans have been sanctioned. Not only that but commencement certificate is also issued in favour of

defendant Nos.1 to 3 and as such prayed for the dismissal of the Notice of Motion.

9. After hearing arguments of the learned Advocates on both the sides and considering documents produced by the parties, learned Trial Judge came to the conclusion that Plaintiffs have not made out any prima facie case for granting temporary injunction as prayed and balance of convenience is also not in their favour. Naturally, he dismissed the Notice of Motion.

10. Being aggrieved by the said order and dismissal of the Notice of Motion, Plaintiffs have filed the present appeal. In this appeal before me, Shri Jahagirdar, learned Senior Counsel for the Plaintiffs has urged only 3 points. Firstly, he submitted that as per the terms and conditions of the lease deed and provisions of law the defendant Nos. 1 to 3 are not entitled to use the TDR purchased by the defendants on the lease land, without the consent of the plaintiffs. Secondly, he canvassed before me that there was no reason for BMC to amend the terms of IOD and grant permission for development in the absence of the

consent of the owner of the land. Lastly, he submitted that Plaintiffs have made out a prima facie case and balance of convenience is also in their favour because if the TDR is used on the leased premises and if at the end of the lease period Plaintiffs intend to purchase the said property as per the terms and conditions of the lease deed, then Plaintiffs would be required to pay more money and thus, it would increase the liability of the Plaintiffs. He, therefore, submitted that the order passed by the learned Trial Judge is not legal and correct and as such the same be set aside and Notice of Motion be allowed.

11. As against this, Shri Ravi Kadam, learned Advocate General supported the order passed by the learned Trial Judge and submitted that there is nothing in the lease deed which can prevent the lessees from using TDR on the leased land. According to him, when the lessees are even permitted to create third party interest and sale property on ownership basis and the lease period can be renewed for further period of 98 years it must be held that the lease in question is a perpetual lease and under the circumstances, defendant

Nos.1 to 3 are entitled to carry out re-development so long as it is not against the provisions of BMC Act and bye-laws or any other laws. He also submitted that when the lease is for almost 200 years or rather perpetual lease it can not be said that the balance of convenience is in favaour of Plaintiff. Besides this, he submitted that even as per the provisions of Section-108(d) of the Transfer of Property Act defendants are entitled to use TDR on the suit land. He, therefore, submitted that the appeal be dismissed.

12. Learned Advocate for the BMC submitted that BMC has issued IOD and commencement certificate as per the provisions of law and Plaintiffs have not shown any reason as to why the permission granted by BMC to defendant for re-development should be cancelled. He, therefore, prayed for the dismissal of the application.

13. It is not in dispute that the suit land is owned by Plaintiffs and that they have executed a registered lease deed in favour of defendant Nos. 1 to 3 on 01/11/1973 for a period of 98 years. Admittedly, there is a stipulation in the lease deed whereby the

defendant Nos.1 to 3 are permitted to carry out construction and re-development of the suit property. In order to find out as to what is the exact stipulation in that behalf it would be worthwhile to re-produce clause-2(d) of the said lease deed. It runs as follows :-

> ***"2(d) To construct at their own costs and expenses on the demised premises, building or buildings, structures suitable for factory with suitable sewers drains and other works, if any, necessary as per the rules and regulations and bye-laws of the Municipal Corporation of Greater Bombay provided that the Lessees shall always remain responsible for any damage which may be caused to any adjacent of such construction work and shall also remain liable for any breach or non-observance or non-performance of any of the provisions of law or bye-laws governing the construction of such building or buildings or factories or works and shall at all times keep the lessors and their estate and effects indemnified against any claim or demand arising out of such damage or breach."***

14. It is pertinent to note that in this clause, there is absolutely nothing to show that any restriction is placed on the defendant Nos.1 to 3 with regard to the area or extent to which the defendants

can carry out construction on the leased land. It is not even mentioned in this clause or any other clause of the agreement that defendants can utilize only FSI admissible to the said land and no TDR can be loaded on the land in question. So, Plaintiffs have in fact, proceeded on a wrong assumption that the agreement provides restriction on the lessees regarding use of TDR. There is absolutely nothing in the agreement which even suggests that defendants would not be entitled to take advantage of the change rules or provisions of any law. Only restriction that has been placed on the defendants while carrying out the construction or re-development is that it should be as per the rules and regulations and bye-laws of the Municipal Corporation of Greater Bombay. So, so long as Plaintiffs do not establish that particular construction is being carried out against particular rules or regulations or bye-laws of the municipal corporation of greater Bombay, Plaintiffs are not entitled to restrict the defendants activity of construction. Incidentally, it must be noted that in the instant case, the BMC has not come out with a case that construction that is being carried out by defendant Nos.1 to 3 is against the provisions

of any bye-law or rules of municipal corporation. Not only that but the Plaintiffs have also not come out with a case that defendant No.4 in connivance with defendant Nos.1 to 3 have sanctioned permission against the provisions of rules, regulations or bye-laws of the Municipal Corporation.

15. It was, therefore, argued on behalf of the Plaintiffs that using of TDR purchased by the defendants in the market, in respect of the suit land can not be termed as accessation to the lease land and as such defendant Nos.1 to 3 are not entitled to use the said TDR on the suit land. In order to find out whether there is any substance in this argument, it would be worthwhile to see what section-108(d) of the Transfer of Property Act says. It runs as follows :-

> ***" 108. Rights and liabilities of lessor and lessee - In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:-***
>
> ***(a) .....***

(b) .....

(c) .....

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease;"

16. While considering arguments in this behalf it must be noted that the TDR purchased by the defendant Nos.1 to 3 is obviously of some other property. What defendants intend to do is to load the said TDR upon leased land. So, in my opinion, TDR purchased in such manner can not be treated as the accessation made to the leased property. However, that does not mean that defendant Nos.1 to 3 are not entitled to use such purchased TDR in respect of the suit land. This is obviously because there is no such restriction is placed on the defendants in the lease agreement. On the contrary, as pointed out above defendant Nos.1 to 3 are in fact at liberty to carry out construction of any nature and extent, so long as it is in accordance with the rules and regulations and bye-laws of BMC. We also

can not ignore the fact that by virtue of clause-4(b) of the lease deed the defendant Nos.1 to 3 are even permitted to mortgage their right, title and interest in the demised premises and building structure standing therein to any one or to let out or to give it on leave and license or on ownership basis. So, when such wide powers are given to the defendants under agreement, by no stretch of imagination it can be said that they are not entitled to load the leased land with TDR in carrying out construction particularly when there is no restriction placed on the defendants in that behalf and such loading is permitted by the BMC.

17. Plaintiffs alleged in their Pleadings that TDR can be used only by the owner and not by the lessor. In order to justify this proposition no specific rule or regulation has been pointed out. On the contrary, when we find that the lease of land has been created practically for 200 years and the lessees are even permitted to carry out any construction activities to any extent so long as it is in accordance with the rules and regulations of the concerned laws, even the lessees are entitled to use the T.D.R. while carrying

out construction on the leased land. It indirectly means that whatever owner or lessor could have done on the suit property can be done by the lessees, particularly when lessors have not reserved their rights in that behalf.

18. Thus, when we find that no restriction is placed on the defendants in carrying out construction on the leased land then having regard to all the terms and conditions of the lease deed in question it is clear that Plaintiffs have failed to make out any prima facie case to show that defendant Nos.1 to 3 can not load the TDR on the leased land without the consent of Plaintiffs. Plaintiffs have not shown that their any legal valuable right is being infringed by the defendant Nos.1 to 3 or by defendant No.4. In fact, if we see the prayer clause of Notice of Motion, it is also very clear that Plaintiffs are in fact not claiming any relief against defendant No.4. So, learned Trial Judge has rightly held that Plaintiffs have failed to make out any prima facie case.

19. It appears that after finding that lessees are

likely to get more benefit or money by use of T.D.R. which was not contemplated when lease deed was executed the plaintiffs are trying to extract some money by creating hurdle in development by filing the present suit.

20. Turning to the question of balance of convenience, it must be noted that defendants have paid rent in respect of the suit land to the Plaintiffs and have obtained necessary sanction for the construction on the leased land. The BMC has also issued IOD and commencement certificate is issued in favour of defendant Nos.1 to 3. Not only that but defendant Nos.1 to 3 are actually developing property. So, if defendants are restrained from carrying out construction, then the very purpose of their securing property on lease on the terms and conditions mentioned in the lease deed would be frustrated. As against this, even if leased land is loaded with TDR and accordingly, construction is carried out still then after lapse of lease period Plaintiffs would be entitled, if they so desire, to purchase the entire construction by paying the amount as mentioned in the lease agreement or they

can even insist on the lessees i.e. defendant Nos. 1 to 3 that they should give the possession of the vacant land as mentioned in the agreement. So, there is no substance in the argument that the additional construction that will be carried out by the defendants, on the basis of TDR, on the suit land would any way increase the liability of the Plaintiffs. On the contrary, considering the fact that the value of the immovable property is appreciating every day, it can not be said that any loss or inconvenience is likely to be caused to the Plaintiffs. So, in my view the learned Trial Judge has rightly observed that the balance of convenience is not in favour of the Plaintiffs.

21. In view of the above discussion, I have no hesitation to hold that the learned Trial Judge has rightly considered all the facts and circumstances of the case and correctly refused to grant temporary injunction as prayed. So, under such circumstances, there is no reason to interfere with the order passed by the learned Trial Judge.

22. In this view of the matter, there is no substance in this appeal.

Appeal is dismissed.

Under the circumstances of the case parties to bear their own costs of this appeal.

(S.R.SATHE,J.)